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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WESTERN FOOD EQUIPMENT COMPANY,

Petitioner,

v.

FOSS AMERICA, INC.

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. Consensual Reference Of Civil Trials To Magistrates Under The Federal Magistrates Act of 1979 Does Not Violate the Constitution	3
II. Western Has Waived Its Right To Object to the Consensual Reference Made Herein	7
III. In Any Event, This Case Is Not An Appropriate Vehicle For Deciding The Constitutionality Of The Consensual Reference Provision Of The Federal Magistrates Act of 1979	8
CONCLUSION	8

TABLE OF AUTHORITIES

	Page
Cases	
Boykin v. Alabama, 395 U.S. 238 (1969)	7
DeCosta v. Columbia Broadcasting System, Inc., 520 F.2d 499 (1st Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976)	5, 7
Fullilove v. Klutznick, 448 U.S. 448 (1980)	4
Garner v. United States, 424 U.S. 648 (1976)	7
Heckers v. Fowler, 69 U.S. (2 Wall.) 123 (1865)	5, 7
Katzenbach v. McClung, 379 U.S. 294 (1964)	4
Kimberly v. Arms, 129 U.S. 512 (1889)	5
Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., U.S. , 102 S. Ct. 2858 (1982)	6
Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., (No. 82-3152)	3, 8
United States v. National Dairy Products Corp., 372 U.S. 29 (1963)	4
Constitutional Provision	
U.S. Constitution, Article III	5
Statutes and Other Authorities	
Bankruptcy Reform Act of 1978	6
Federal Magistrates Act of 1979, 28 U.S.C. § 636(c)	2, 3, 4, 5, 8
Patent Act, 35 U.S.C. § 285	2
Supreme Court Rule 34.1(g)	2
H.R. Rep. No. 96-287, 96th Cong., 1st Sess., 7-9 (1979)	5
S. Rep. No. 96-74, 96th Cong., 1st Sess., 4 (1979)	4

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STATEMENT OF THE CASE

Respondent, Foss America, Inc. ("Foss"), is in essential agreement with the discussion of Petitioner, Western Food Equipment Co. ("Western"), of the case below, appearing on pages 1-2 of Western's petition under the heading "Proceedings Below". Foss wishes to augment Western's presentation merely by adding that the issue now raised by Western in its present petition was *never* raised below, either at the trial level or before the Ninth Circuit Court of Appeals. Consequently, there is absolutely no record below pertaining to this issue.

Western's "Statement of the Case", appearing on page 6 of its petition, is somewhat misleading. However, as the facts recited by Western in its Statement of the Case are immaterial to the consideration of the question presented in Western's

petition, Supreme Court Rule 34.1(g), they are treated here by footnote.[1]

SUMMARY OF ARGUMENT

There is no constitutional infirmity in the provision of the 1979 Magistrates Act, 28 USC §636(c), which authorizes a magistrate to hear and determine a civil action upon consent of the parties. Statutes passed by Congress are entitled to a presumption of constitutionality. This presumption is especially appropriate here, where Congress specifically considered and rejected the constitutional objection raised by Western. Further, the constitutionality of consensual reference of civil actions to other than Article III judges has been upheld in a long line of decisions dating back over a century.

The constitutional objection raised by Western in its petition seeks redress for an alleged violation of a due process right, namely, right to trial by an Article III federal judge. It has long been recognized, however, that due process rights of this nature are waivable. By consenting to trial before a magistrate, and by failing to object to this waiver at the trial level, Western has waived any objection it may have had.

Finally, even if this Court considers the issue raised in Western's petition to merit consideration, this case is a particularly inappropriate vehicle for resolution of the issue. Thus, Western is raising the constitutionality of its consensual reference to a magistrate for the first time in its present petition. It never raised the issue at the trial level or before the Court of Appeals. Consequently, there is a complete absence of any

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[1] Western implies that the jury rendered a verdict in favor of Western on each of the three issues recited in Western's Statement of the Case. Not so. The portion of the trial which resulted in an award of attorney's fees to Foss pursuant to 35 USC §285 was tried to the court sitting without a jury. Also, regarding Western's deceit claim, Western contends there was disputed evidence at trial. Again, not so. The alleged dispute was between two of Western's own witnesses, one of whom was the Chairman of the Board and Chief Executive Officer of Western, and it was his testimony which resulted in the trial court's dismissal of Western's deceit claim.

record to assist this Court. Should this Court conclude that this issue warrants its consideration, it is submitted that the Court should await a case wherein the issue was treated below. Such a case is now under active consideration by the Ninth Circuit Court of Appeals, *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, (No. 82-3152).

ARGUMENT

I. Consensual Reference Of Civil Trials To Magistrates Under The Federal Magistrates Act Of 1979 Does Not Violate the Constitution

Both the language and the legislative history of the Federal Magistrates Act of 1979 support the constitutionality of consensual references. The 1979 Magistrates Act, 28 U.S.C. § 636 (c), provides in pertinent part:

> "(1) *Upon the consent of the parties,* a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves.
>
> (2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent." (Emphasis added)

It is apparent from the Act that the power granted to magistrates to decide civil matters is grounded firmly on consent. Under subsection (2), that consent must be freely forthcoming, with no manner of coercion applied to either party. Where such consent is given the parties subject themselves to the full adjudicatory power of the magistrate, and to all of its attendant consequences. In the present case, Western's consent to trial before a magistrate was knowingly and freely given. Furthermore, Western makes no attack on the quality or fairness of that trial.

Acts of Congress are, of course, entitled to a presumption of constitutionality. *United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963); *Fullilove v. Klutznick*, 448 U.S. 448, 472-73 (1980); *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964). That presumption is particularly appropriate in this case because Congress gave careful consideration to the constitutionality of permitting case-dispositive references of civil cases to magistrates before adopting Section 636(c) of the Act. Congress concluded on the basis of that analysis that consensual reference of civil cases was clearly constitutional. In reporting the Act, the Senate Judiciary Committee concluded:

> The bill makes clear that the voluntary consent of the parties is required before any civil action may be referred to a magistrate. In light of this requirement of consent, no witness at the hearings on the bill found any constitutional question that could be raised against the provision. [S. Rep. No. 96-74, 96th Cong., 1st Sess., 4 (1979)].

The House Committee report also emphasized the constitutionality of this provision.

> The committee inquired with great care into any possible constitutional objections to expansion of magistrate civil and criminal case-dispositive jurisdiction with the consent of the parties. It reviewed the printed records from the Senate and House hearings on the 89th, 90th, 94th and 95th Congresses during which this question was

also examined. Likewise, the committee reviewed its own reports from the 90th and 94th Congresses.

* * *

In addition, during the 95th Congress the Senate carefully inquired into the issue during two days of hearings and found that the legislation passed constitutional muster * * *. Since no court has found the present statutory scheme to be constitutionally defective, and several have spoken approvingly, the committee is confident that the proposed legislation passes constitutional muster. [H.R. Rep. No. 96-287, 96th Cong., 1st Sess. 7-9 (1979) (footnotes omitted)].

Congress' conclusion that the consensual reference provision of the Act is constitutional is in accord with a long line of cases going back over a century. In *Heckers v. Fowler,* 69 U.S. (2 Wall.) 123 (1865), the Court upheld a written agreement wherein the parties referred the action to a referee " 'to hear and determine the same and all the issues therein, with the same powers as the court.' " The agreement specified " 'that an order [would] be entered making such reference and that the report of the referee [would] have the same force and effect as a judgment of the court.' " 69 U.S. at 127.

Similarly, in *Kimberly v. Arms,* 129 U.S. 512 (1889), the Court upheld a consensual reference by the parties to a special master for the determination of all issues in the case. Under the terms of the reference, the master had the authority to hear and decide all issues as if the trial were conducted by the court.

Indeed, the constitutionality of the consensual reference provision of the 1979 Act was specifically upheld in the signal case of *DeCosta v. Columbia Broadcasting System, Inc.,* 520 F.2d 499 (1st Cir. 1975), *cert. denied,* 423 U.S. 1073 (1976). The court held that "parties could, without violation of Article III freely consent to refer cases to non-Article III officials for decision." 520 F.2d at 507. In reaching its decision, the court referred to *Heckers* and to *Kimberly* and found "no significant

difference between arbitration and consensual reference for decision to magistrates." In both instances, the court said, "the parties have freely and knowingly agreed to waive their access to an Article III judge in the first instance." 520 F.2d at 505.

In its petition, Western has made extensive reference to *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, _____ U.S. _____, 102 S. Ct. 2858 (1982). Contrary to Western's view, *Marathon* does not suggest that case-dispositive consensual reference of civil cases to magistrates is unconstitutional. Indeed, the inference from the various opinions in *Marathon* is that a *consensual* reference to a magistrate, as opposed to the *non-consensual* reference to bankruptcy judges before the Court in *Marathon,* does not pose a constitutional problem. For example, Justice Brennan's opinion, in distinguishing between the jurisdiction conferred under the constitutionally infirm Bankruptcy Reform Act of 1978, and that of the prior Act, stated: "the referee had no jurisdiction [under the old Act], *except with consent,* over controversies beyond those involving property in the actual or constructive possession of the court." 102 S. Ct. at 2876 n. 31 (Emphasis added). Plainly, in resolving the constitutionality of a determination by other than an Article III judge, the Court considered consent of the parties to be a critical distinction between the two Acts. Similarly, writing in dissent, Chief Justice Burger noted that matters "related only peripherally to an adjudication of bankruptcy under federal law, must, *absent the consent of the litigants,* be heard by an 'Article III court' if [they are] to be heard by any court or agency of the United States." 102 S. Ct. at 2882 (Emphasis added). And Justice White, referring to the trial of state law claims by bankruptcy judges, stated that such cases "would have to be heard by Article III judges or by state courts—*unless the defendant consents to suit before the bankruptcy judge*—just as they were before the 1978 Act was adopted." 102 S. Ct. at 2884 (Emphasis added).

II. Western Has Waived Its Right To Object to the Consensual Reference Made Herein

Western never objected at the trial level to its consensual reference. Nor did it do so in its appeal filed in the Ninth Circuit Court of Appeals. Nor did it do so in its request for rehearing filed in the Ninth Circuit Court of Appeals. Western raises this issue for the first time in the present petition; this is an obvious afterthought in a last ditch effort to avoid judgment day.

Without direct case support, Western argues at pages 9-10 that the issue it now raises goes to subject matter jurisdiction, and hence can be raised at any time. This is incorrect. What is in issue here is the due process right to trial before an Article III federal judge. *DeCosta v. Columbia Broadcasting System, Inc.*, 520 F.2d at 506.

This Court has explicitly approved the waiver of constitutional due process rights, including the waiver of rights that would preclude adjudication by a judge of an Article III court. See, for example, *Heckers v. Fowler, supra* (parties' consensual reference of all issues to a referee to hear and determine upheld); *Garner v. United States,* 424 U.S. 648 (1976) [approval of waiver of right against self-incrimination]; *Boykin v. Alabama,* 395 U.S. 238, 243 (1969) [right to plead guilty to criminal charges]. Additionally, this Court has upheld the waiver of other basic constitutional rights, such as the waiver of a right to a jury trial, waiver of right to counsel, waiver of right to a speedy trial, and waiver of the Fourth Amendment right against unreasonable searches. Just as these basic constitutional rights may be waived, so may the parties agree to waive their constitutional right to an adjudication by a judge of an Article III court. This is precisely what Western has done here. Having done so, it hardly can now belatedly object to that waiver because the magistrate did not decide in Western's favor.

III. In Any Event, This Case Is Not An Appropriate Vehicle For Deciding The Constitutionality Of The Consensual Reference Provision Of The Federal Magistrates Act of 1979

Because Western is raising the issue of the constitutionality of the consensual reference provision of the Magistrates Act of 1979 for the first time in its Petition For Certiorari, there is a complete absence of any record below which would assist this Court should it decide the issue merits consideration. For this reason alone, it would seem appropriate to deny Western's petition in favor of a future case having a more complete record.

In this regard, there is a case now pending before the Ninth Circuit Court of Appeals, *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.* (No. 82-3152), wherein the identical issue raised by Western is now under active consideration.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Dated: July 15, 1983

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By .....

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify pursuant to the provisions of Rule 28.3 of the Rules of the Supreme Court of the United States that on July 15, 1983 I served the foregoing Brief In Opposition To Petition For Writ Of Certiorari upon all parties required to be served by depositing three printed copies thereof in a sealed envelope, with first class airmail postage prepaid, in the United States Post Office in New York, New York addressed to each of such persons at the regular office address listed below:

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